UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HARRY MICHAEL DOOLEY, Appellant, v. TENNESSEE VALLEY AUTHORITY, Agency.	DOCKET NUMBER SL07528910318 DATE: FEB 15 1990

Dan W. Poole, Esquire, Poole, Lawrence, Thornbury, Stanley & Morgan, Chattanooga, Tennessee, for the appellant.

Maureen H. Dunn, Esquire, Knoxville, Tennessee, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of an initial decision, issued June 13, 1989, that dismissed his appeal for lack of appellate jurisdiction. For the reasons discussed below, the Board GRANTS the appellant's petition under 5 U.S.C. § 7701(e), REVERSES the initial decision, and REMANDS the case to the St. Louis Regional Office for adjudication.

BACKGROUND

The appellant appealed his removal from his position of Mechanical Test Section Supervisor, Sequoyah Nuclear Plant, effective March 27, 1989, for falsification of agency employment and security records. See Agency File, Tabs 4c and 4d. In responding to the appellant's appeal, the agency asserted that the appeal should be dismissed for lack of jurisdiction because the appellant was not a preference eligible entitled to appeal to the Board under 5 U.S.C. § 7511(a)(1)(B). *See* Appeal file, Tab 10. The agency contended that the appellant was discharged "under other than honorable conditions" from the Navy, effective June 17, 1987, in lieu of court-martial. *Id.* at Tab 14. The agency further stated that the appellant's military service began in 1972 and continued until his discharge in June 1987, and, therefore, he was not a preference eligible.

The appellant asserted that he received an honorable discharge in August 1974, another honorable discharge in July 1979, and a third honorable discharge in May 1983. He claimed that his discharge in June 1987 was other than honorable but was not a dishonorable discharge, and that the earlier honorable discharges caused him to be a preference eligible.

In his initial decision, the administrative judge noted that the appellant had been employed in the excepted service, and that an excepted service employee could appeal a removal to the Board only if he was a preference eligible employee with a year of current continuous service in the same or

similar positions. *See* 5 U.S.C. § 7511(a)(1)(B). He found that an employee could be considered a preference eligible only if he had been separated from the armed forces under honorable conditions. He also found, relying upon *McGinty v. Brownell*, 249 F.2d 124 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 952 (1958), and *Kohlberg v. Gray*, 207 F.2d 35 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 937 (1954), that, where an honorable discharge was followed by a discharge under other than honorable conditions, the latest discharge was controlling for purposes of establishing preference eligibility under 5 U.S.C. § 2108. He therefore found that the appellant was not a preference eligible, and he dismissed the appeal for lack of Board jurisdiction.

In his petition for review, as amended,[1] the appellant reiterates the contentions he raised below. For the reasons set forth below, we find that the appellant is a preference eligible and is entitled to appeal his removal to the Board.

ANALYSIS

Section 7511(a)(1)(B) of title 5, U.S.C., provides that persons who meet the following definition of an "employee" may appeal adverse actions (including removals) to the Board:

> [A] preference eligible in an Executive agency in the excepted service ... who has completed 1

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[1] We have considered the appellant's submission dated July 15, 1989, because it was filed within 35 days of the issuance of the initial decision. *See* 5 C.F.R. § 1201.113. We also have considered the agency's response to that submission.

> year of current continuous service in the same or similar positions.

There is no dispute that the appellant was employed in the excepted service, *see Dodd v. Tennessee Valley Authority*, 770 F.2d 1038, 1040 (Fed. Cir. 1985), and that he had over one year of current continuous service in his position. The sole issue for resolution by the Board accordingly is whether the appellant is a preference eligible and whether, therefore, he may appeal to the Board. *See* 5 U.S.C. § 7701(a).

The record reflects that the appellant's first three periods of military service extended from August 15, 1972, to August 15, 1974, from August 16, 1974, to July 8, 1979, and from July 9, 1979, to May 14, 1983; the appellant received an honorable discharge at the end of each of these periods. *See* Agency File, Tab 4a, attachments 29-33. He also received a discharge under other than honorable conditions on June 17, 1987. *Id.*, Tab 4h. The appellant contends that, although his last discharge was under "other than honorable conditions," he is a preference eligible because of his previous honorable discharges. We agree.

As defined at 5 U.S.C. § 2108(1), a preference eligible means, insofar as is relevant here, a person who served on active duty during specified time periods and "who has been separated from the armed forces under honorable conditions." Under the plain language of this provision, the appellant is a preference eligible.[2] He served during a time period covered

[2] *See* Sands, *Sutherland Statutory Construction* § 46.01 (4th ed. 1984) (one who questions the application of the plain

under that section, see 5 U.S.C. § 2108(1)(B), and he was separated three times under honorable conditions.

As we have stated above, the administrative judge relied on *McGinty* and *Kohlberg* in finding that the appellant's most recent discharge was controlling. For the reasons stated below, however, we find that neither case supports that finding.

In *Kohlberg*, the employee had been honorably discharged as an enlisted man in order to be commissioned as an officer. When he later was discharged again, neither the form documenting his separation nor the letter discharging him indicated the nature of the discharge. The employee subsequently was dismissed from his position with the Veterans Administration for falsifying his employment application by responding affirmatively to the question of whether the word "honorable" or the word "satisfactory" was used in his discharge papers to show the type of his discharge. The court found that, because the employee's "so-called discharge" from service as an enlisted man neither returned him to civilian

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meaning rule to a provision of an act must show either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in pari materia with other acts, or with the legislative history of the subject matter, imports a different meaning). *See also United States v. Clark*, 454 U.S. 555, 561 (1982) (if the statutory language is clear, it is ordinarily conclusive); *Cox v. U.S. International Trade Commission*, 6 M.S.P.R. 336, 337-38 (1981) (where statutory language and objective are clear, the implications of situations not covered by the clear language of the statute, and contrary to the objective of the clear language, is not permissible); *Patrick v. Department of Transportation*, 6 M.S.P.R. 247, 250 n.1 (1981).

life nor separated him, except for one day, from military service, his statement on the employment application was a falsification. *Id.* at 36. Because the court in this case did not address the question of whether the employee was a preference eligible, we find that *Kohlberg* does not resolve the question addressed in this Opinion.

The employee in *McGinty* also was given an honorable discharge as an enlisted man so that he could accept an appointment as an officer, and he subsequently was separated from the military under conditions other than honorable. The court found that the honorable discharge that the employee received did not cause the employee to be a preference eligible because it did not mark the termination of his active duty. *Id.* at 126. In making this finding, it relied on a section of the Veterans Administration's regulations that provided as follows:

> The discharge of a service person to accept appointment as a commissioned or warrant officer ... is a qualified and conditional discharge and does not constitute a termination of the person's war service for compensation and pension purposes. The entire service in such case constitutes one period of service, and the conditions of final termination of active service will govern and determine basic eligibility to compensation or pension.

Id. at 126 & n.2, citing 38 C.F.R. § 3.62 (1956).

We note that a similar provision now appears in the Veterans Administration's regulations at 38 C.F.R. § 3.13(a). That section provides as follows:

> A discharge to accept appointment as a commissioned or warrant officer, or to change

> from a Reserve or Regular commission to accept a commission in the other component, or to reenlist is a conditional discharge if it was issued during one of the following periods:
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> (1) World War I ... .
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> (2) World War II, the Korean conflict or the Vietnam era; prior to the date the person was eligible for discharge under the point or length of service system, or under any other criteria in effect.
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> (3) Peacetime service; prior to the date the person was eligible for an unconditional discharge.

Paragraph (b) of the same section provides further that, "[e]xcept as provided in paragraph (c) of this section, the entire period of service under the circumstances stated in paragraph (a) ... constitutes one period of service and entitlement will be determined by the character of the final termination of such period of active service except ... for death pension purposes ... ." Paragraph (c) consists of the following:

> Despite the fact that no unconditional discharge may have been issued, a person shall be considered to have been unconditionally discharged or released from active military ... service when the following conditions are met:
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> (1) The person served in the active military ... service for the period of time the person was obligated to serve at the time of entry into service;
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> (2) The person was not discharged or released from such service at the time of completing that period of obligation due to an intervening enlistment or reenlistment; and
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> (3) The person would have been eligible for a discharge or release under conditions other than dishonorable at that time except for the intervening enlistment or reenlistment.

McGinty, the regulatory provision on which the *McGinty* court relied, and 38 C.F.R. § 3.13[3] all provide strong support for the view that a distinction is to be made between the effect of "conditional" discharges such as that at issue in *McGinty* and the effect of discharges that, even if they are followed by immediate reenlistment, occur at a time when the person has completed the service he was obligated to perform, and when he would be eligible to terminate his military service under honorable conditions.[4] While the former would not, under *McGinty*, cause a person to be a preference eligible, the latter would do so.

The agency has not disputed the appellant's assertion that his first three discharges occurred at times when he had completed the service he was obligated to perform, and when he was eligible to terminate his military service. Furthermore, as we have indicated above, the appellant received honorable discharges at the end of each of his first three periods of military service. We therefore find that the appellant's honorable discharges are not "conditional" discharges of the

[3] Section 3.13 of title 38, C.F.R., does not specifically address the question of preference eligibility for federal employment purposes. We note, however, that the provision considered by the *McGinty* court also did not do so, and that the court considered it nevertheless because it found that provision to be instructive. *McGinty v. Brownell*, 249 F.2d 124, 126 (D.C. Cir. 1957). For the same reason, we have considered 38 C.F.R. § 3.13.

[4] Although 38 C.F.R. § 3.13 refers to "conditions other than dishonorable," an employee seeking to rely on his discharge to show his eligibility to file an appeal would be able to rely only on a separation effected under "honorable conditions," 5 U.S.C. § 2108(1).

kind at issue in *McGinty* (and apparently, in *Kohlberg*), and that the appellant is a preference eligible because under 5 U.S.C. § 2108(1), Congress did not expressly define "separated from the armed forces under honorable conditions" as being limited to the ultimate or last period of military service. Thus, any period of qualifying military service followed by an honorable discharge falls within the scope of 5 U.S.C. § 2108(1).[5]

Accordingly, we remand this case to the regional office to hold the hearing requested by the appellant and to issue an initial decision on the merits of the case.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

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[5] The appellant's other than honorable discharge would not appear to be a bar to any Veterans Administration benefits granted pursuant to his other discharges. *See* 38 C.F.R. § 3.12(a) (conditioning eligibility for benefits on the character of the discharge for "the period of service on which the claim is based"); 38 C.F.R. § 3.13(d) (one is deemed discharged where the period of duty to which he is obligated has . . been completed and he was eligible for discharge under conditions other than dishonorable, even if due to an intervening reenlistment no discharge was issued).